PRIVY COUNCIL REPORT

TAY BOK CHOON v. TAHANSAN SDN. BHD.

[P.C. (Lord Bridge of Harwich, Lord Fraser of Tulleybelton, Lord Templeman, Lord Griffiths & Lord Ackner) January 19, 20 & February 16, 1987]

[Privy Council Appeal No. 8 of 1985]

Company Law – Winding-up of company – Just and equitable ground – Affidavit evidence – Whether oral evidence should have been taken – Companies (Winding-up) Rules 1972 – R.H.C. 1980, O.38 r.2(3) – Companies Act, 1965, s. 218(1)(i).

Practice and Procedure – Winding-up proceedings – Affidavit evidence – Whether oral evidence should be taken – R.H.C. 1980, O.38 r. 2(3).

In this case the facts were summarised in the judgment as follows: The company was incorporated on November 7, 1977 as a private company limited by shares. The articles conferred on the directors power, in their discretion and without assigning any reason, to refuse to register a transfer of shares to any person of whom they did not approve. The memorandum and articles were subscribed by four subscribers who were appointed by the articles to be the first directors of the company. The nominal capital of the company was 400,000 shares of $1 each; 25,000 shares were issued to each of the four directors and were paid up. The principal business of the company was the manufacture of window louvres at a factory in Kuala Lumpur. One of the shareholders, Tee Ah Kew, was a relation of the petitioner. In February 1980, possibly at the instigation of Tee but in any event with the approval of the directors, 25,000 shares then held by Chew Kew Hui were transferred to the petitioner for $18,750. In the course of the negotiations for the transfer of shares to the petitioner and for the approval of the directors it was agreed between the directors and the petitioner that the petitioner would be appointed a director and chairman of the board of directors. The petitioner was subsequently so appointed and in addition his son, Tay Hock Yam, was appointed to be a fifth director. In March 1980 a finance company Balfour Williamson (S) Pte. Ltd. introduced by the petitioner agreed to finance the company if the paid up capital was increased from $100,000 to $200,000 and if each of the four shareholders guaranteed the liabilities of the company to Williamson. Accordingly 25,000 shares were issued to each of the four shareholders for cash paid to the company. The petitioner lent $25,000 to Tee and $16,000 to another shareholder Mak Boon Seng. All the four shareholders entered into guarantees with Williamson. Monthly salaries were paid to three working directors, Tee, Mak and Tay, the petitioner's son. In 1979 the company, after paying directors' remuneration of $40,000, made a trading loss of $29,483. In 1980 the company, after paying directors' remuneration of $33,000, made a net trading profit of $6,849. On June 30, 1981 the remuneration of each of the three working directors was increased to $1,500 per month. On September 23, 1981 the board, against the opposition of the petitioner and his son Tay, terminated all the executive powers of the directors and conferred them on Mak alone as managing director. On November 27, 1981 the petitioner was removed as director and as chairman of the board and his son Tay was removed as director. On April 8, 1982 the petitioner presented his petition to wind up the company. The trading profit for 1981 after providing $46,000 for directors' remuneration had increased to nearly $125,000. The directors' report dated July 3,1982 affirmed that no dividend had been paid and that it was not intended to declare a dividend but on August 5, 1982 the company declared a dividend of 30% for 1981. In the distribution of this dividend the petitioner was paid $9,000 after deduction of $6,000 for income tax. Also on August 5, 1982 the remuneration of the directors Mak and Tee was increased to $2,500 per month each.

The petitioner applied to have the respondent company wound up and the learned trial judge had made a winding-up order on just and equitable grounds under section 218(1)(i) of the Companies Act, 1965. He held that the petitioner had joined the company as a shareholder on the basis that he would be given a share in the management of the business and that he would remain a director so long as he held one quarter of the shares of the company and that the other shareholders would allow the petitioner to participate in the conduct of the affairs of the company – see [1984] 1 M.L.J. 204. On appeal to the Federal Court it was argued that such an underlying obligation had not been proved and was denied by the respondents. The Federal Court took the view that although no litigant applied to call oral evidence and no litigant applied to cross-examine the deponents the court should have examined the deponents. In effect the Federal Court held in the face of the denial that the agreement was ever made, the trial judge should have heard oral evidence before deciding whether the alleged agreement was ever made. They therefore allowed the appeal – see [1985] 1 M.L.J. 58. The petitioner appealed to the Privy Council.

Held: (1) viewing the facts as a whole their Lordships are satisfied, as the trial judge was satisfied, that the petitioner was led to believe, even in the absence of any express assurance, that he would participate in the management of the company and that he would in any event be entitled to a seat on the board so long as he held one quarter of the issued share capital of the company;

(2) in civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender. In winding-up proceedings the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him, unless some opposing party has applied for the attendance for cross-examination of the deponent and that application has been granted and the deponent does not attend;

(3) if allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts;

(4) in this case the Board is satisfied that the judge confined his consideration of the petition to the undisputed facts and rightly concluded that the petitioner had made out his case that it was just and equitable to wind up the company;

(5) the appeal should be allowed and the order of the trial judge restored.

Case referred to:

(1) *In re Westbourne Galleries* [1973] A.C. 360, 379.

PRIVY COUNCIL APPEAL FROM MALAYSIA

J.M. Chadwick Q.C. (*Tommy Thomas* with him) for the appellant

Michael Beloff Q.C. (*P. Royan* with him) for the respondent.

Cur. Adv. Vult.

Lord Templeman (delivering the Judgment of the Board): By section 218(1)(i) of the Companies Act 1965 a company incorporated in Malaysia may be wound up if the High Court:-

". . . is of opinion that it is just and equitable that the company be wound up."

On the petition of the appellant, Tay Bok Choon, the respondent company, Tahansan Sdn. Bhd., was on February 25, 1983 ordered by N.H. Chan J. to be wound up. That order was set aside by the Federal Court (Salleh Abas L.P. and Wan Suleiman and George Seah F.JJ.) on July 11, 1984. The petitioner, with leave of the Federal Court, appeals to His Majesty the Yang di-Pertuan Agong.

The company was incorporated on November 7, 1977 as a private company limited by shares. The articles conferred on the directors power, in their discretion and without assigning any reason, to refuse to register a transfer of shares to any person of whom they did not approve. The memorandum and articles were subscribed by four subscribers who were appointed by the articles to be the first directors of the company. The nominal capital of the company was 400,000 shares of $1 each; 25,000 shares were issued to each of the four directors and were paid up. The principal business of the company was the manufacture of window louvres at a factory in Kuala Lumpur. One of the shareholders, Tee Ah Kew, was a relation of the petitioner. In February 1980, possibly at the instigation of Tee but in any event with the approval of the directors, 25,000 shares then held by Chew Kew Hui were transferred to the petitioner for $18,750. In the course of the negotiations for the transfer of shares to the petitioner and for the approval of the directors it was agreed between the directors and the petitioner that the petitioner would be appointed a director and chairman of the board of directors. The petitioner was subsequently so appointed and in addition his son, Tay Hock Yam, was appointed to be a fifth director. In March 1980 a finance company Balfour Williamson (S) Pte. Ltd. introduced by the petitioner agreed to finance the company if the paid up capital was increased from $100,000 to $200,000 and if each of the four shareholders guaranteed the liabilities of the company to Williamson. Accordingly 25,000 shares were issued to each of the four shareholders for cash paid to the company. The petitioner lent $25,000 to Tee and $16,000 to another shareholder Mak Boon Seng. All the four shareholders entered into guarantees with Williamson. Monthly salaries were paid to three working directors, Tee, Mak and Tay, the petitioner's son. In 1979 the company, after paying directors' remuneration of $40,000, made a trading loss of $29,483. In 1980 the company, after paying directors' remuneration of $33,000, made a net trading profit of $6,849. On June 30, 1981 the remuneration of each of the three working directors was increased to $1,500 per month. On September 23, 1981 the board, against the opposition of the petitioner and his son Tay, terminated all the executive powers of the directors and conferred them on Mak alone as managing director. On November 27, 1981 the petitioner was removed as director and as chairman of the board and his son Tay was removed as director. On April 8, 1982 the petitioner presented his petition to wind up the company. The trading profit for 1981 after providing $46,000 for directors' remuneration had increased to nearly $125,000. The directors' report dated July 3, 1982 affirmed that no dividend had been paid and that it was not intended to declare a dividend but on August 5, 1982 the company declared a dividend of 30% for 1981. In the distribution of this dividend the petitioner was paid $9,000 after deduction of $6,000 for income tax. Also on August 5, 1982 the remuneration of the directors Mak and Tee was increased to $2,500 per month each.

The Courts of Malaysia are agreed that the principles enunciated in *In re Westbourne Galleries*[1] apply to a petition under section 228 for a winding up on just and equitable grounds. In that case Lord Wilberforce, at page 379, pointed out that the words "just and equitable":

". . . are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this

definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, . . . entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."

In the present case the respondent company, representing the interests of the shareholders other than the petitioner, contends that the petitioner is only seeking to escape from the majority provisions of the constitution of the company by which he is bound. The petitioner argues on the other hand that the undisputed facts created an "expectation" on his part that his participation in management would not be terminated without good reason and that he would remain a director so long as he held one quarter of the shares in the company and equally imposed on the other shareholders "an obligation" to allow the petitioner to participate in the conduct of the affairs of the company. It was never contemplated, says the petitioner, that he would be reduced to the supine position of a minority shareholder whose only right was to attend the company in general meeting. No attempt was made by evidence in these proceedings to justify the expulsion of the petitioner from his position or to justify the assumption by Mak of control of the company's affairs towards the end of the year in which for the first time the company appears to have made substantial profits under the chairmanship of the petitioner.

In this company there were only four shareholders, they held an equal number of shares, they were all directors and no one shareholder could transfer his shares without the consent of at least two of the others. These facts may go some way to establish that the relationship between the shareholders shared some of the attributes of a partnership. But in the absence of any further indications or oral assurances the petitioner would not discharge the burden of proving that the other shareholders were not entitled to use their voting powers in the company to oust the petitioner without due cause and in the interests of the company and were under an obligation to continue to appoint the petitioner as a director of the company. But there are further indications. In the first place the petitioner was promised appointment as chairman of the board as a result of negotiations carried on before he bought his shares in the company. In the second place the petitioner contributed further capital to the company shortly after he became a shareholder. In the third place the petitioner assumed liability for debts of the company owed to Williamson. And in the fourth place the petitioner at about the same time loaned large sums to two of his fellow shareholders. The petitioner could of course have terminated his guarantee at any time and could have called in his loans at any time; but he could only terminate his guarantee by jeopardising the financial support for the company which he must have considered to be important or essential for the well-being of the company. He could only call in his loans by jeopardising those good relationships between shareholders which are of obvious importance for the prosperity and management of a company composed of only four shareholders.

Viewing the facts as a whole their Lordships are satisfied, as the trial judge was satisfied, that the petitioner was led to believe, even in the absence of any express assurance, that he would participate in the management of the company and that he would in any event be entitled to a seat on the board so long as he held one quarter of the issued share capital of the company. Their Lordships have no doubt that the other shareholders were glad in 1980 to obtain the co-operation and support of the petitioner as a financier and businessman on terms that he would participate and would be appointed director. Although no specific undertakings may have been given an obligation is to be implied or inferred from the conduct of the parties to allow the petitioner to participate in management and to be a director unless by withdrawal of his support or for some other good reason a change in management and control became necessary.

The Federal Court appear to have taken the view that the petitioner could not succeed because he did not prove that at the date when he acquired his interests in the company he was given any express assurance that his participation in management and his appointment as director would not be determined. The petitioner swore affidavits deposing that some assurances had been given and the other shareholders swore affidavits denying that any assurance had been given. Neither side applied to cross-examine the deponents. The petitioner's legal advisors were entitled to take the view, and were proved right before the trial judge in taking the view, that the admitted and incontrovertible facts disclosed by the affidavits were sufficient, without oral evidence and without any express assurances, to prove the expectation of the petitio-

ner and the obligation of the other shareholders that the petitioner would not be removed without due cause.

The Federal Court took the view that although no litigant applied to call oral evidence and no litigant applied to cross-examine the deponents to affidavits filed by any other litigant nevertheless:-

"Order 38 rule 2(3) of the Rules of the High Court empowers the Court to examine the deponents regardless of the absence of such application, and we agree that in this instance it should have done so."

Order 38 rule 2(3) is in these terms:

"(3)In any cause or matter begun by originating summons, originating motion or Petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court."

The Company's (Winding Up) Rules 1972 provide for a winding up petition to be verified by affidavits and for affidavits in opposition and reply to be sworn and filed. This procedure was followed in the present case. In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender. In winding up proceedings the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross-examination of the deponent and that application has been granted and the deponent does not attend. The Court cannot give a direction about evidence unless one of the litigants desires such direction to be made. Of course a judge may indicate to a petitioner that unless he calls oral evidence or applies to cross-examine the deponents of the opposition so as to prove a disputed fact, his petition is likely to fail. The judge may equally indicate to a respondent that unless he calls oral evidence or applies to cross-examine the petitioner's deponents for the purposes of disproving an allegation made by the petitioner, then the petitioner is likely to succeed. At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts. On behalf of the respondent in the present case it was submitted that the trial judge paid some attention to the petitioner's disputed allegations of an express assurance but the Board is satisfied that the judge confined his consideration of the petition to the undisputed facts and rightly concluded that the petitioner had made out his case that it was just and equitable to wind up the company.

Their Lordships will accordingly advise His Majesty the Yang di-Pertuan Agong that the appeal should be allowed and the order of Chan J. be restored, and that the respondent should pay the appellant's costs in the Federal Court and before the Board.

Appeal allowed.

Solicitors: *Herbert Smith & Co.; Alan Taylor & Co.*